IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1180

OLD DOMINION BRANCH NO. 496, NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

and

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, *Appellants,*

v.

HENRY M. AUSTIN, L. D. BROWN, and ROY P. ZIEGENGEIST, *Appellees.*

On Appeal from a Judgment of the Supreme Court of Virginia

JURISDICTIONAL STATEMENT

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Appellants appeal from the judgment of the Supreme Court of the State of Virginia entered on November 27, 1972, affirming three judgments awarding a total of $165,000 in damages against appellants for publication of certain matter in the June, 1970, issue of the monthly newspaper of appellant Old Dominion Branch No. 496. Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the Virginia Supreme Court, Appendix A to this Statement, is reported at 192 S.E. 2d 737. It has not yet been published in the official reports.

JURISDICTION

Appellees' cause of action and the judgment below were based upon Va. Code § 8-630 (1957), Virginia's "insulting words" statute, p. 3, *infra*. In their answer, and at every subsequent step of the proceedings in the trial court and in the court below, appellants contended that the statute on its face, as construed, and as applied to the facts herein conflicts with the United States Constitution and Executive Order 11491. The courts below rejected those contentions (App. A, *infra*, pp. 5a, 7a, 8a, 9a, 10a-11a).[1] The judgment below was entered on November 27, 1972, and the Notices of Appeal (*infra*, pp. 34a-36a) were filed on December 20, 1972. Jurisdiction to review the decision below by direct appeal is conferred upon this Court by 28 U.S.C. § 1257(2).

QUESTIONS PRESENTED

1. Whether a state statute which, as authoritatively construed, makes "insulting words" actionable, without a showing of immediate danger of breach of the peace, if the words are uttered with "actual malice," defined as "hostility," is unconstitutional for overbreath and vagueness.

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[1] The court below neglected to mention that appellants attacked the statute as unconstitutional not only "on its face" but also as construed by the trial court and applied to the facts of this case (A. 16, 49, 81-82; Tr. 236, Appellant's Brief to the court below, p. 3, questions). *Terminello* v. *Chicago*, 337 U.S. 1, 5-6 (1949). "A" refers to the Appendix to the briefs filed in the court below; "Tr." refers to the transcript of the proceedings in the trial court.

2. Whether *New York Times* v. *Sullivan,* 376 U.S. 254 (1964), bars application of the statute to a union publication which identifies nonmembers as "scabs" and defines "scab" in pejorative terms, for the purpose of inducing the nonmembers to join.

3. Whether *New York Times* v. *Sullivan* controls the application of a state defamation statute to a labor dispute governed by federal law.

4. Whether an award of compensatory and punitive damages against the unions totaling $165,000, for publishing the matter in question, is "excessive" within the meaning of *Linn* v. *Plant Guard Workers,* 383 U.S. 53, 65-66 (1966), and therefore barred by Federal labor law.

STATUTES INVOLVED

Code of Va. § 8-630 (1957) provides: "Action for insulting words.—All words which from their usual construction and common acceptation are construed as insults and tend to violence and breach of the peace shall be actionable."

The relevant provisions of Executive Order 11491, 34 Fed. Reg. 17,605 (1969), are set out in Appendix B hereto.

STATEMENT

A. The Facts.

Appellant Old Dominion Branch No. 496 (Branch) is an autonomous local union affiliated with appellant National Association of Letter Carriers, AFL-CIO (NALC). Under Executive Order 11491, and, subsequently, the Postal Reorganization Act and the National Labor Relations Act, the postal authorities at all relevant times have recognized NALC as the national and Branch as the local exclusive collective bargaining representative of city letter carriers in the

Richmond area.[2] During the period relevant herein, appellees were city letter carriers whom appellants represented under compulsion of the Executive Order. But appellees were "free riders": they were nonmembers who paid no dues or fees to either Branch or NALC.[3]

Without the knowledge or sanction of any officer or agent of NALC, in an effort to induce nonmembers like appellees to join, Branch from time to time published the names of nonmembers (including appellees) under the heading "List of Scabs" in the Branch's monthly newsletter.[4] The newsletter is distributed by mail to Branch members only (Tr. 76). In the June, 1970, issue, Branch printed above the "List of Scabs" a well known piece of trade union literature, generally thought to have been written by Jack London, explaining in

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[2] Under the Postal Reorganization Act, 84 Stat. 719 (1970), 39 U.S.C.A. § 101 et seq., (1972 Supp.), certain provisions of the Postal Reorganization Act and the National Labor Relations Act superseded the cited Executive Order. See 39 U.S.C.A. §§ 1201-1209; Postal Reorganization Act §§ 10, 15a, 84 Stat. 784, 787 (1970). Appellants' representative status and the rights of employees established by the Executive Order remain in effect under the Postal Reorganization Act and contracts negotiated pursuant thereto.

[3] Neither the Executive Order nor the Postal Reorganization Act permits contracts making union membership a condition of employment. Executive Order 11491, § 12(c), *infra*, p. 25a; 39 U.S.C.A. § 1209(c) (1972 Supp.).

[4] The record shows that, in labor parlance, a "scab" is a nonmember. (Tr. 163-164). See, e.g., Webster's Third New International Dictionary "scab," 4:b(1) ("one who refuses to join a union"); Webster's New Twentieth Century Dictionary, unabridged, Second Edition (The World Pub. Co., 1968), p. 1614.

highly uncomplimentary terms "what a scab is."[5] (App. A, *infra*, pp. 2a-3a). The June issue was posted on a station bulletin board (App. A, *infra*, p. 3a). There is no evidence that anyone other than a letter carrier saw it there.

B. The Proceedings in the Trial Court.

Appellees filed complaints for damages in the Law and Equity Court of the City of Richmond, Virginia. Appellants filed demurrers, arguing that the publication complained of is protected against state court

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[5] The explanation of the meaning of the term "scab" is as follows:

"The Scab

"Some co-workers are in a quandary as to what a scab is; we submit the following:

'After God had finished the rattlesnake, the toad, and the vampire, He had some awful substance left with which He made a scab.

'A scab is a two-legged animal with a corkscrew soul, a water brain, a combination backbone of jelly and glue. Where others have hearts, he carries a tumor of rotten principles.

'When a scab comes down the street, men turn their backs and angels weep in Heaven, and the Devil shuts the gates of hell to keep him out.

'No man (or woman) has a right to scab so long as there is a pool of water to drown his carcass in, or a rope long enough to hang his body with. Judas was a gentleman compared with a scab. For betraying his Master, he had character enough to hang himself. A scab has not.

'Esau sold his birthright for a mess of pottage. Judas sold his Savior for thirty pieces of silver. Benedict Arnold sold his country for a promise of a commission in the British Army. The scab sells his birthright, country, his wife, his children and his fellowmen for an unfulfilled promise from his employer.

'Esau was a traitor to himself, Judas was a traitor to his God, Benedict Arnold was a traitor to his country; a SCAB is a traitor to his God, his country, his family and his class!' "

damage suits by the freedom of speech guarantee of the United States Constitution and by federal labor law. The demurrers were overruled in an opinion holding that the suit was governed by the Virginia "insulting words" statute, Code of Va., § 8-630, and that the statute, as applied to the challenged publication, is constitutional. Defendants thereafter filed timely answers (A. 12, 17), affirmatively asserting, *inter alia,* constitutional defenses predicated upon the First and Fourteenth Amendments and the Supremacy Clause of the United States Constitution, and explicitly pleading that the Virginia statute for insulting words "on its face and as construed and applied to the complaint herein in the letter opinion of the Court dated January 21, 1971 [overruling the demurrer]" is void for overbreadth and vagueness. On the basis of these defenses, the defendants, at the close of plaintiffs' evidence and again at the close of all evidence, moved the court to strike plaintiffs' evidence and enter judgment for defendants. These motions were overruled. (A. 38-39, 46).

At trial, appellee Austin testified that after the article appeared some of his co-workers stopped speaking to him and otherwise manifested hostility toward him, and that one postal worker's wife called him a "scab" (Tr. 101-103) Seven months after the article appeared, he testified, he got a migraine headache. (Tr. 103). Another appellee, Brown, testified that the article upset him, that he had headaches, and that some of his co-workers called him "scab" and other names (Tr. 149-150). The third appellee, Ziegengeist, testified that after the publication some of his co-workers became "cool" towards him (Tr. 130). His teenage daughter also testified that after "the *case* came up" she feared someone might come and harm "us" and that Ziegen-

geist and his wife had many arguments (Tr. 143, emphasis added). There was no other evidence of injury. (App. A, *infra*, 3a-4a.)

The trial court instructed the jury that the occasion on which the statements in question had been made was privileged; that plaintiffs were therefore liable only if they had "abused" the privilege by making "defamatory" statements with "actual malice;" that statements are defamatory and libellous if they contain "words which from their usual construction and common acceptance are construed as insults and tend to violence and breach of the peace," and that "actual malice" means having been "actuated by some sinister or corrupt motive such as hatred, personal spite, ill will, or desire to injure the plaintiff; or that the communication was made with such gross indifference and recklessness as to amount to a wanton or willful disregard of the rights of the plaintiff." (App. A, *infra*, pp. 9a-10a) [6] No cautionary instruction was given as to the amount of damages. Defendants took approrpiate objections and exceptions. (A. 46-54).

The jury returned a verdict awarding each of the appellees $10,000 in compensatory damages and $45,000 in punitive damages. Appellants then moved for

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[6] (A. 76-77) The court denied defendants' request for an instruction defining a malicious publication as one intended "to constitute a [false] representation of fact or facts, as distinguished from an expression of feelings, emotions or opinions, and . . . known by its maker to be false, in fact or . . . made without regard or concern for its factual truth." The court explained to counsel that, under Virginia law, hyperbole and statements of opinion, no less than statements of fact, are actionable (A. 48-49, 70-71).

The court below conceded (App. A, infra, pp. 10a-11a), that appellants properly took and preserved their objection to the trial court's rejection of the *New York Times* principles.

judgment N.O.V., for a new trial, and for a remittitur. These motions were denied. (A. 55-56).[7]

C. The Decision Below.

On appeal, the Supreme Court of Virginia rejected appellants' claims that the insulting words statute, on its face and as here applied, violated appellants' right to freedom of speech; that adoption of the *New York Times* v. *Sullivan,* 376 U.S. 254, 285, standards in *Linn* v. *Plant Guard Workers,* 383 U.S. 53, 65 (1966), "to effectuate the statutory design with respect to pre-emption" governed appellees' suit; that the above described instructions with respect to "defamation," "malice" and burden of proof did not conform to those standards; that the statute as so applied conflicted with *Gooding* v. *Wilson,* 405 U.S. 518 (1972); and that the damage award was clearly excessive under *Linn, supra,* 383 U.S. at 65, 66.

The court held that the Virginia insulting words statute had been narrowed by state court decisions making the common law rules of slander applicable to actions under the statute, so that defamatory words, if uttered on a privileged occasion, are actionable only upon a showing of "actual malice", as defined by the trial court (p. 7 *supra*). (App. A *infra,* pp. 5a, 10a). The court declared that where the defamatory statement "was made with actual malice" the "public interest in free expression and communication of ideas" does not "outweigh [ ] the interest of the State in protecting the individual plaintiff from damage to his reputation and social relationships" (App. A, *infra,*

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[7] Proceedings in a suit filed by another employee whose name appeared in the June, 1970 newsletter have been held in abeyance by stipulation pending the outcome of this appeal.

p. 5a). In the court's view, since the Virginia statute condemns "privileged" statements only if made with "actual malice" it reaches "only those words that are not protected by the First Amendment" (App. A, *infra*, p. 5a).

The court also held that the *New York Times* definition of "actual malice" was inapplicable because that definition extends only to publication of matters of "general or public interest." (App. A, *infra*, p. 8a). The court reasoned that since plaintiffs had a right, under both federal and state law, not to join the union, their refusal to join "was only a private matter and an issue of general concern or public interest was not involved." (*Ibid.*) The court found *Linn* v. *Plant Guards, supra,* support for its position, quoting its cession to state courts of power to award damages for "malicious utterance of defamatory statements" in labor disputes (App. A, *infra,* p. 7a). But the court did not mention *Linn's* adoption by analogy of the *New York Times* definition of "actual malice", and ignored its holding that State power to award damages for defamatory statements in labor disputes is bounded by the *New York Times* standards and that damages must not be excessive.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

1. THE STATUTE AS AUTHORITATIVELY CONSTRUED IS UNCONSTITUTIONALLY OVERBROAD AND VAGUE.

(a) Overbreadth

Gooding v. *Wilson,* 405 U.S. 518 (1972), establishes the unconstitutional overbreadth of the Virginia statute upon which the judgment below was rendered. The Virginia statute makes actionable "all [written or spoken] words which from their usual construction

and common acceptation are construed as insults and tend to violence and breach of the peace . . . ." The Georgia statute struck down in *Gooding* provided that "any person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor." 405 U.S. at 519. The similarity between the statute involved in *Gooding* and the one at issue here is fatal to the latter's constitutionality. Words which "are construed as insults and tend to violence and breach of the peace" are precisely equivalent to "opprobrious words or abusive language, tending to cause a breach of the peace."

To the extent that the two statutes differ on their face, that of Virginia is broader and therefore more suspect constitutionally. On its face, the Georgia statute prohibited only opprobrious words spoken to or of another *"in his presence."* It could be argued, therefore, as the appellee and the dissenting Justice did, 405 U.S. at 522-23, 528, that the "opprobrious words and abusive language * * * prohibited are [only] those which as a matter of common knowledge and under ordinary circumstances will, when used to or of another person, and in his presence, naturally tend to provoke violent resentment, * * * [i.e.] 'fighting words.'" No such argument can be advanced for the Virginia statute, however, for it reaches written words, which are not used "in the presence" of the subject, and which are incapable of provoking an immediate violent response against the writer.

The fact that a Georgia court had construed "tendency to cause a breach of the peace" to reach "future"

assaults led this Court to conclude that the Georgia statute unconstitutionally encompassed "utterances when there was no likelihood that the person addressed would make an immediate violent response." 405 U.S., at 528. The defect which came into the Georgia statute by construction appears in the very terms of the Virginia statute, and has not been eliminated by interpretation. Consequently, the statute is unconstitutional on its face and as construed. *Gooding, supra; Terminello* v. *Chicago,* 337 U.S. 1 (1949); *Cohen* v. *California,* 403 U.S. 15, 25-26 (1971). Cf. *Edwards* v. *South Carolina,* 372 U.S. 229, 237 (1962); *Cox* v. *Louisiana,* 379 U.S. 536, 551-552 (1965); *Coates* v. *Cincinnati,* 402 U.S. 611 (1971). *Compare Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 573 (1942) (statute construed to be applicable only to "face-to-face" words likely to cause an immediate breach of peace by addressee held constitutional) *with Cafeteria Employees' Union* v. *Angelos,* 320 U.S. 293 (1943) (pickets insulting customers by calling them "unfair" and "fascist"; held hyperbole, not enjoinable absent imminent threat of violence).[8]

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[8] *Youngdahl* v. *Rainfair,* 355 U.S. 131 (1957), is in accord with this analysis. There, upon findings that mass picketing marked by threats of violence and name calling in unison (including cries of "scab") was *calculated* to provoke immediate violence and was *likely to do so* unless promptly restrained, this Court sustained an injunction against the name calling. As we have seen, the Virginia Statute is not limited to calculated provocation of immediate violence or utterances creating an *imminent* danger thereof. Nor did the instructions given the jury (p. 7, *supra; infra,* pp. 9a-10a) or the prior decisions of the court below have the effect of so narrowing the statute. There was no evidence that distribution of appellant's newsletter was calculated to cause or did cause any violence at any time.

(b) Vagueness

In addition to being overbroad, the statute as here construed is void for vagueness. The statute does not define the "insults" which it renders actionable, but refers instead to "usual construction and common acceptation," and to "tendency to violence and breach of the peace." So referenced, "insult" is no less subject to varying individual definition than "annoy," which in *Coates* v. *City of Cincinnati,* 402 U.S. 611, 612-614, this Court held specifies "no standard of conduct at all".

The court below said that the "construction and limitations" (App. 5a, *infra*), it placed upon Code § 8-630 restrict its reach to "those words which are not protected by the First Amendment" (*Ibid.*). On the contrary, they add confusion to its unconstitutional vagueness. The jury was instructed (App. A, *infra,* p. 9a) that the statements complained of were to be considered "defamatory and libelous" if they are commonly construed as "insults and tend to violence and breach of the peace." However, the jury was also told that

> "mere words of abuse indicating that one party dislikes another or that he has a low opinion of him, without more, does not amount to defamation. A *certain* amount of vulgar name calling, indicating hostility or ill will, under certain circumstances is tolerated by the law." (Emphasis added.) (App. A, *infra,* p. 10a)

This construction and application of the statute, upheld by the court below, leaves at large not only the question of what language is "insulting," but also *what "amount* of vulgar name calling, indicating hos-

tility or ill will", under the circumstances of this case, is tolerated by Virginia law. As to this, the jury was left free to speculate and to predicate its conclusion on its own prejudices and notions of social policy. Given this latitude, no speaker or writer can predict what language may subject him to liability. Since this statute operates directly in the area of First Amendment freedoms, the statute is unconstitutionally vague. *Coates* v. *Cincinnati,* 402 U.S. 611 (1971); *NAACP* v. *Button,* 371 U.S. 415, 432-433, 437-438 (1963). *Cf. Greenbelt Cooperative Pub. Ass'n* v. *Bresler,* 398 U.S. 6, 11 (1970).[9]

2. THE STATUTE AS APPLIED IS UNCONSTITUTIONAL BECAUSE THE PUBLICATION PENALIZED THEREUNDER IS PROTECTED BY THE FIRST AMENDMENT

The court below erred in holding, in the face of *New York Times* v. *Sullivan,* 376 U.S. 254 (1969) and its progeny, that the Virginia statute could constitutionally be applied to permit recovery for the "insulting words" printed here. Landmark decisions of this Court[10] establish that "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution * * *," *Thornhill* v. *Alabama,* 310 U.S. 88, 102-103 (1940), and that refusal

[9] At least five other states penalize insulting words or make them actionable by statute. Ala. Code Tit. 14 § 11 (1959); Ky. Rev. Stat Ann. § 437-020 (1969); Code of W. Va. § 55-7-2 (1946); Louisiana Rev. Stat. Ann. §§ 14:103, 14:103.1 (1972 Supp.); 1942 Miss. Code Ann. § 1059 (1957). None of the statutes define the term "insulting."

[10] *E.g., AFL* v. *Swing,* 312 U.S. 321 (1941); *Bakery Drivers' Local* v. *Wohl,* 315 U.S. 769 (1942); *Thomas* v. *Collins,* 323 U.S. 516 (1945); *Thornhill* v. *Alabama,* 310 U.S. 88 (1940). Cf. *NLRB* v. *Fruit & Veg. Packers,* 377 U.S. 58, 76 (Black, J., concurring).

of eligible workers to join a union is a "labor dispute." *Senn* v. *Tile Layers Union,* 301 U.S. 468, 478 (1937). The identity of the parties, here the nonmembers, is "information concerning the facts of a labor dispute . . . ," *Thornhill, supra,* and the union has a legitimate interest in disseminating that information to its members and to the public so that they may individually and collectively persuade and use social pressure to induce nonmembers to join. Cf. *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415, 416, 419 (1971); *Cafeteria Employees Union* v. *Angelos,* 320 U.S. 293 (1943).

First Amendment protections are not lost because a speaker (here the union) uses strong language. The dissemination of opinion, in however emotive a form, for the purpose of exerting peaceful pressure upon adversaries in a labor dispute, is beyond the power of the State to suppress.[11] See *Thornhill, supra,* 310 U.S. at 104; *Thomas* v. *Collins,* 323 U.S. 516, 537 ("Free trade in ideas means free trade in the opportunity to persuade to action, not merely to describe facts."); *Organization For a Better Austin* v. *Keefe,* 402 U.S. 415, 417, 419 (1971); *Cohen* v. *California,* 403 U.S. 15 (1971); *Cafeteria Employees Union* v. *Angelos,* 320 U.S. 293, 295 (1943). In *Cohen, supra,* this Court said (403 U.S. at 25-26):

> ". . . we cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative

[11] Damage actions, especially those resulting in large verdicts like the one here, have a more chilling effect upon communication of ideas and opinions than many criminal statutes. *New York Times* v. *Sullivan,* 376 U.S. 259, 277-279 (1969). See also *id.* at 265-266 (Award of damages is "state action" within the reach of the Fourteenth Amendment).

> function: it conveys not only ideas capable of relaltively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words often are chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated."

In the labor dispute context, "the most repulsive speech enjoys immunity, provided it falls short of a deliberate or reckless untruth." *Linn* v. *Plant Guard Workers*, 383 U.S. 53, 63 (1966).[12] "[S]o long as the means are peaceful, the communication need not meet standards of acceptability." *Organization For A Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971). Unless an immediate danger of breach of the peace is created, the use of words, however "insulting," which truthfully convey the speaker's thoughts or emotions about conduct offensive to him are protected by the First Amendment. *Gooding* v. *Wilson*, 405 U.S. 518 (1972); *Greenbelt Cooperative Pub. Assn.* v. *Bresler*, 398 U.S. 6 (1970) (description of appellee's negotiating position as "blackmail" entitled to constitutional protection). Cf. *Curtis Publ. Co.* v. *Birdsong*, 360 F.2d 344, 345 (5th Cir. 1966) (calling state highway policemen "bastards" privileged).

The "insulting" aspect of the publication performs a special function in the context of an organizing campaign. It is designed to make known to the nonmem-

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[12] "[I]n labor disputes, both sides are masters of the arts of villification, invective and exaggeration." *Id.* at 67-68 (Black, J., dissenting on other grounds).

bers the revulsion which their alienation creates among their fellow workers, and to persuade them to join to avoid being known as "scabs." If, in consequence, the nonmembers join, the strength and solidarity of the Union will be increased and the burden of carrying "free riders" will be lessened or lifted. In addition, shared aversion to the nonmembers' conduct helps solidify the members' fealty to the union. Speech for these purposes is plainly protected by the First Amendment. *Thomas* v. *Collins,* 323 U.S. 516, 537 (1945); *Thornhill* v. *Alabama,* 310 U.S. 88, 104 (1940).[13]

We assume *arguendo* with the court below (App. A, *infra,* p. 8), that speech addressed to *purely* private matters is not protected by the First Amendment and that such speech is not protected by the restrictions on common law defamation announced in *New York Times* v. *Sullivan, supra.*[14] But the extensive Presi-

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[13] The same result obtains under the Supremacy Clause. (See pp. 20-21, *infra.*) The relationship of the parties was governed by Executive Order 11491, which is binding on the States under the Supremacy Clause (see p. 20, *infra*). Section 1 of that Executive Order is identical to § 7 of the National Labor Relations Act. As this Court observed in *Linn* v. *Plant Guard Workers,* 383 U.S. 53, 61, the National Labor Relations Board (which, of course, has primary jurisdiction to construe the NLRA) has repeatedly held that "epithets such as 'scab', 'unfair', and 'liar' are commonplace in these struggles and not so indefensible as to remove them from the protection of § 7, even though the statements . . . defame one of the parties to the dispute." Circulation of the definition of "scab", held actionable herein, is also protected by the NLRA. *Cambria Clay Prods. Co.,* 106 NLRB 267, 273 (1953), *enforced in part and remanded on other grounds,* 215 F.2d 48 (6th Cir. 1959). See also *Gulfcoast Trans. Co.* v. *N.L.R.B.,* 332 F.2d 28, 30-31 (5th Cir. 1964).

[14] But see *Rosenbloom* v. *Metromedia,* 403 U.S. 29, 48, n. 17 (1971).

dential, judicial, administrative and Congressional regulation surrounding employee exercise of the right to join or refrain from joining labor unions,[15] as well as the First Amendment labor cases cited *supra*, p. 13, surely demonstrate, contrary to the holding below, that speech aimed at influencing employees' membership decisions is addressed to a matter of public or general, not merely private, concern, especially within the community of affected employees who saw the publication in issue. See *Rosenbloom* v. *Metromedia*, 403 U.S. 29, 42 (1971); *Time, Inc.* v. *Hill*, 385 U.S. 374, 387-388 (1967); *American Steel Foundaries* v. *Tri-City Central Trades Council*, 257 U.S. 184, 208-210 (1921). For similar reasons, the court below erred insofar as its decision may be read as holding that exercise of the right to abstain from union membership is protected by a right of privacy against publications pointedly, but peacefully, designed to induce employees to join up. See *Organization for A Better Austin* v. *Keefe*, 402 U.S. 415, 419;[16] *Rosenbloom* v. *Metromedia, supra; Ex-*

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[15] *E.g., NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 580-583, 601-610 (1969); National Labor Relations Act §§ 1(a), 8(a)(1), (3)(b)(1)(A), (7), 8(c) 29 U.S.C.A. §§ 151, 158(a)(1), (3), (b)(1)(A), (7), (c) (1965); Executive Order 11491, §§ 1(a), 19(a)(1), (b)(1), (c).

[16] In *Keefe, supra*, the state court thought that because the real estate broker had a legal right to buy and sell property in the manner he did, that right could constitutionally be protected against publications "intended to exercise a coercive impact on" him to change. This Court reversed.

Insofar as the court below may have rested its "right of privacy" theory on Virginia's "Right to Work" law (Code of Virginia §§ 40.1-58 to 40.1-69), it obviously erred. Section 14(b) of the National Act, without which state right to work laws could not operate, permits the states to protect the "right to work" only against contracts which make union membership a condition of employment. *Retail Clerks* v. *Schermerhorn*, 375 U.S. 96, 104-105 (1963).

celsior Underwear, 156 NLRB 1236, 1242-44 (1966), *approved on other grounds, NLRB* v. *Wyman Gordon Co.,* 394 U.S. 759 (1969).

Accordingly, *New York Times* v. *Sullivan,* 376 U.S. 254 (1964) applies and precludes recovery for the dissemination of fact and opinion here in issue. *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29 (1971).[17] There is no evidence and no finding that the published statements were untrue. "On the contrary, even the most careless reader must have perceived that the word[s] used [were] no more than rhetorical hyperbole, vigorous epithet[s] used by those who considered [appellees'] . . . position extremely unreasonable." *Greenbelt Cooperative Publ. Ass'n., Inc.* v. *Bresler,* 398 U.S. 6, 14 (1970). Indeed, the record is completely devoid of evidence that anyone in the postal station or anywhere else thought appellees had "water brains" or combination "backbone[s] of jelly and glue." See *Greenbelt, supra.* Here, the individuals identified as "scabs," were, indeed, "scabs." "To permit the infliction of financial liability upon appellants for publishing these . . . articles would subvert the most fundamental meaning of a free press, protected by the First and Fourteenth Amendments." *Greenbelt, supra,* at

[17] *Rosenbloom* holds that "if a matter is a subject of public or general interest, it cannot become less so merely because a private individual is involved, or because in some sense the individual did not voluntarily become involved. The public's primary interest is in the event, the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior notoriety or anonymity." 403 U.S. at 43. Cf. *Gertz* v. *Robert Welch, Inc.,* 41 U.S.L. Week 2104 (7th Cir., decided Aug. 1, 1972), *cert. granted,* 41 U.S.L. Week 3441 (No. 72-617, Feb. 20, 1973). See also *Keefe, supra,* 402 U.S. 418, 419.

14. As applied by the courts below in this case, the Virginia statute plainly violates the Constitution.[18]

So far as we are aware, a damage award for calling a "scab" a "scab" or printing a pejorative explanation of that term in a union newspaper is unprecedented. If allowed to stand, the decision below could mute not only union journals, but numerous other special audience publications around the country which try to stimulate sympathetic readers to political and social action, *inter alia*, by identifying their opponents (however correctly), and freely hurling derogatory epithets at them. The fair housing movement will have to give up "blockbuster," despite the protection afforded by this Court's decision in *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971); right-wing groups will have to give up "pinko"; leftist groups "Fascist"; pacifist groups "warmonger"; civil rights groups "racist." The list is endless.

The impact on the labor movement will be especially far-reaching. For the use of "insulting words," reflecting the aversion ("malice", the court below called it) of union members toward nonmembers is a commonplace, as this Court well knows. *Linn* v. *Plant Guard Workers*, 383 U.S. 53, 63 (1966); *Cafeteria Workers Union* v. *Angelos*, 320 U.S. 293, 295 (1943). Furthermore, union publications are addressed to workers, not genteel young ladies or aged spinsters. Working people are accustomed to tough talk, hyperbole and insult. By and large, they are not attuned to delicate innuendos. The labor press will be vastly and ad-

[18] The constitutionality of the statute, as applied to the facts herein, is not saved by the common law "malice" imputed to appellants. Compare App. A, *infra*, pp. 5a, 10a with *Greenbelt supra*, 398 U.S. at 10.

versely affected if, in communicating with member-readers, it cannot use language which adversaries find offensive and which state courts and hostile juries find "insulting."

3. HOLDING THE DEFAMATION ACTIONABLE UNDER THE VIRGINIA STATUTE OVERSTEPPED THE LIMITS IMPOSED BY FEDERAL LABOR LAW

The courts below erred in holding that the statute could authorize damage awards for defamatory words published with "malice" (*i.e.*, hostility) in the course of a labor dispute (App. A, *infra*, pp. 6a-7a). Even if the First Amendment did not preclude that holding, this Court's decision in *Linn*[19] does. In *Linn*, this Court adopted the *New York Times* tests by analogy and, as a matter of federal labor policy, barred all state court defamation suits and judgments for damages arising out of labor disputes which did not meet those tests. 353 U.S. at 65. The court below properly recognized that *Linn* was applicable here (App. A, *infra*, pp. 6a-7a, 11a).[20] But it misinterpreted *Linn's* references to "defamatory statements . . . made with malice" (*Id.* at 6a, quoting 353 U.S. at 55) and ignored its adoption of the *New York Times* definition of malice and the "clear and convincing evidence" standard as limitations upon defamation actions in labor disputes

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[19] *Linn* v. *Plant Guard Workers*, 383 U.S. 53, 64-66 (1966).

[20] Although *Linn* arose under the National Labor Relations Act, rather than under the Executive Order (see n. 13, p. 16, *supra*), that Order is essentially equivalent to the Act in both content and purpose, and "is to be accorded the force and effect given to a statute enacted by Congress." See *Farkas* v. *Texas Instrument, Inc.*, 375 F.2d 629, 632 (5th Cir. 1967), *cert. denied*, 389 U.S. 977 (1967). See also *Farmer* v. *Philadelphia Elec. Co.*, 329 F.2d 3, 8 (3d Cir. 1964); *Gnotta* v. *United States*, 415 F.2d 1271, 1275 (8th Cir. 1969).

(*id.* at 7a. Compare 383 U.S. at 65). Accordingly, the court below sustained jury instructions (p. 7, *supra*), and judgments based thereon, which indisputably conflict with the *New York Times* standards adopted in *Linn* (App. A, 10a-11a, pp. 7-8, *supra*). This error is so clear that summary reversal on this ground alone is warranted. *Cf. Henry* v. *Collins*, 380 U.S. 356 (1965); *Beckley Newspapers* v. *Hanks*, 389 U.S. 81 (1967).

4. THE DAMAGE AWARD WAS EXCESSIVE

On the assumption that the *New York Times* standards would be scrupulously observed, this Court found it necessary in *Linn* to guard against "the propensity of juries to award excessive damages for defamation [which] may pose a threat to the stability of labor unions and small employers." *Linn, supra*, 383 U.S. at 64. Accordingly, it held that trial courts should reduce or vacate excessive damage awards, *Id.* 65-66. Assuming, *arguendo*, that a state may lawfully award damage for a publication protected under *New York Times* standards, as it did here, the size of any "compensatory" award must be scrutinized even more carefully and punitive damages should be prohibited altogether.

Here, the damages were plainly excessive on their face. Cf. *New York Times* v. *Sullivan, supra*, 376 U.S. at 276-278. One of the appellees received $10,000 "compensation" for being treated "coolly" by some of his co-workers and for arguing with his wife (see pp. 6-7, *supra*); none suffered any pecuniary loss.[21] The total jury award, $165,000, was almost seven times the total revenue of appellant Branch and over twenty-three times the annual dues paid by Branch members to ap-

[21] The absence of pecuniary loss was one of the factors which troubled the Court in *New York Times, supra*, 376 U.S. at 277.

pellant NALC.[22] Furthermore, the award was only a portion of the liability that would have been incurred had all fifteen "scabs" sued.[23] The amount of the damages plainly reflect "community hostility to [the] defendant[s] or to an ideology . . . [they] represent, rather than a dispassionate appraisal of besmirched reputation."[24]

CONCLUSION

For the reasons set forth above, the decision below conflicts with controlling decisions of this Court (especially *Gooding, Linn, New York Times, and Rosenbloom*) and should be summarily reversed on the authority of those cases. As we have seen, moreover, the questions presented are important, since their resolution will have a substantial impact on the freedom of the labor press, on the free speech rights of unions and their members, and on the relationship between the

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[22] The Branch's total revenues in the year 1971 were $22,952.00. 1971 Annual Report of Old Dominion Branch No. 496, National Association of Letter Carriers, Form LM-3, on file with the United States Department of Labor. Evidence presented at trial apprized the courts below of the approximate revenue of the Branch. See Def. Ex. 4, Art. VIII, § 2; Tr. 79. NALC's annual per capita dues for active (i.e., non-retired) members in 1971 were $16. Constitution of the National Association of Letter Carriers (1970), Art. VII, § 2, Def's. Ex. 3. Since there are 400 to 420 active members in Branch 496 (Tr. 79) the total revenue received from them by NALC is between $6,400 and $6,720 per annum.

[23] See note 7, *supra*. There was no attempt to separate the "injury" resulting from the dissemination of the fact that appellees refused to join the union and the "injury" resulting from the publication of the "insulting" label "scab" and the offending definition.

[24] *Currier, Defamation In Labor Disputes: Preemption and The New Federal Common Law*, 53 VA. L. REV. 1 (1967).

federal government and the states in the delicate area of labor relations. In addition, as this case demonstrates, further explication is needed of the limits on damage awards announced in *Linn*. Accordingly, if the Court is not disposed to reverse summarily, we urge that probable jurisdiction be noted and that the questions presented be set down for full briefing and argument.[25]

Respectfully submitted,

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[25] If the Court believes that one or more of the questions presented is not appealable under 28 U.S.C. § 1257(2), we respectfully request that the Court consider those issues along with the merits of the appealable issues, *Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530, 547 (1922) or that the Court treat relevant portions of this Statement as seeking *certiorari* and review those issues pursuant to 28 U.S.C. § 2103. *Cantwell* v. *Connecticut*, 309 U.S. 626, 310 U.S. 296 (1940).